



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 13, 1998

Ms. Moira Parro
Assistant District Attorney
County of Dallas
Administration Building
411 Elm Street
Dallas, Texas 75202

OR98-1933

Dear Ms. Parro:

You ask this office to reconsider our ruling in Open Records Letter No. 98-1253 (1998). Your request for reconsideration was assigned ID# 117399.

Open Records Letter No. 98-1253 determined that Dallas County (the "county") must release to the requestor a proposal for an election ballot counting system submitted to the county by Election Systems & Software, Inc. ("Election Systems") because Election Systems failed to establish that the requested information was excepted from required public disclosure based on section 552.110 of the Government Code. This office had notified Election Systems of the request and invited the company to raise exceptions to public disclosure of its information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). However, Election Systems failed to respond to our notification.

You now ask that we reconsider this ruling in light of the fact that the addressee of our notification to Election Systems, Ms. Bonnie Cuellar, never received the notification apparently because of the mistaken address this office used in notifying Election Systems of the request. This office addressed the notification to Ms. Bonnie Cuellar at Election Systems' Omaha office rather than at Ms. Cuellar's actual work address at Election Systems' Dallas office. Election Systems now asserts that a portion of its proposal, Appendix C, Product Research and Development, is excepted from required public disclosure based on section 552.110 of the Government Code as confidential commercial or financial information.

Section 552.110 excepts from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks & Conservation Ass'n* claim by mere conclusory assertion of a possibility of commercial harm. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. Open Records Decision No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985)).

We have reviewed Election Systems' arguments. We conclude that Election Systems has established that Appendix C is confidential commercial and financial information excepted from disclosure based on section 552.110. Accordingly, we overrule Open Records Letter No. 98-1253 with regard to the public release of Appendix C.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hastings
Deputy Chief
Open Records Division

KHH/mjc

Ref.: ID# 117399

Enclosures: Submitted documents

cc: Mr. Murray Joseph Rossini
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(w/o enclosures)